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AUG 9 1985

LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.

PETITIONER

v.

Case No. 84-1870

EDWARD JAMES THOMAS, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Edward James Thomas, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Respondent has previously been granted leave to so proceed in both the U.S. District Court and U.S. Court of Appeals. Respondent's affidavit in support of this motion is attached hereto.

Edward James Thomas
EDWARD JAMES THOMAS, Respondent

AFFIDAVIT

I, Edward James Thomas, being first duly sworn according to law, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed ? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source ? No

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account ? No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing ? No

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. - none

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury

Edward James Thomas
EDWARD JAMES THOMAS, Respondent

Subscribed and Sworn to Before me this 6th day of July, 1985 in the County of Union State of Florida.

C. E. Crews
NOTARY PUBLIC
Notary Public, State of Florida
My Commission Exp. on Feb. 6, 1987

IN THE
UNITED STATES DISTRICT COURT
OCALA DIV. 2016

CASE NO. 84-1870

LOUIS L. HEBERMEIER,
AND THE ATTORNEY GENERAL OF THE STATE
OF FLORIDA, JIM SMITH,
RESPONDENT

-/-

EDWARD EARL JAMES,
PETITIONER

RESPONDENT'S REPLY IN OPPOSITION TO PETITIONER'S APPLICATION
FOR CERTIORARI

EDWARD EARL JAMES
#041071
REGIONAL L-100-22
UNION CORRECTIONAL INSTITUTION
POST OFFICE BOX 221
RAIFORD, FLORIDA 32083

QUESTION PRESENTED

Whether the federal habeas corpus petition should have been dismissed without prejudice to allow a state prisoner to exhaust state remedies when the inmate's first state collateral attack had already been denied because of procedural default and under WAINWRIGHT V. SYKES, 433 U.S. 107, 125 n. 25 (1982), exhaustion would be futility because state law restricts subsequent collateral attacks ?

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OPINION BELOW

The per curiam opinion of the Eleventh circuit court of Appeals upon which petitioners attempts to envoke jurisdiction of this court to review is unreported, and shown at Appendix "A - 27", of petitioners application for writ of certiorari,which Respondent adopts and incorporates herein by refererce. The opinion affirmed an unpublished order of the United States District Court of the Middle District of Florida which dismissed Respondent's petitions for writ of Habeas corpus, and is shown at petitioners Appendix "A -23 thru 25" said. Respondent adopts and incooporates herein by reference.

GROUNDS JURISDICTIONAL SENTENCE

This court has jurisdiction to duty petitioners' application for certiorari pursuant to, and under the authority of rule 17 of the United States Supreme Court rules.

STATUTORY PROVISION INVOLVED

Section 28 U. S. C. 2254; and 28 U.S.C. 2243 provide in pertinent part:

...the court shall...determine the facts, and dispose of the matter as law and justice require.

OBJECTION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

COMES NOW, EDWARD JAMES THOMAS, Respondent in the cause, and enters this his Objection to Petitioner's application for Writ of Certiorari.

Jurisdiction of this Court to entertain is invoked pursuant to Rule 22.3 of Rules of this Court.

The basis of this objection are that: (a) the decision of the Court below is not in conflict with another Court of appeals; of a decision of this Court; nor has it decided a Federal question in a way which conflict with a decision of Florida Supreme Court; nor does the Court below, by affirmation of the District Court's order and opinion which requires Respondent exhaust state remedies, depart from the accepted and usual course of Judicial Proceedings; nor does the Court below by it affirmation, in Thomas v. Florida, 84-5014, give rise to any question of is sufficient to invoke jurisdiction of this Honorable Court under the authority of 28 U. S. C. 1254 (1).

As such, Respondent object to Petitioner's application for Certiorari, and request that this Honorable Court deny same.

RESPECTFULLY SUBMITTED,

Edward James Thomas

OPPOSING STATEMENT OF THE CASE

On the 15th, day of January 1980, Respondent was charged by information with burglary, and grand theft under case number 80-23 CF in the circuit court of the fourth judicial circuit of Florida. On the same date another information was filed in said court charging Respondent with burglary and grand theft under case number 80 - 25 CF.

After trial by jury, Respondent was found guilty as charged in each count of the informations. Following adjudication of guilt, and imposition of sentence, an appeal was taken to Florida first District court of appeals. Both burglary judgments and two of the three grand theft judgments and sentences were affirmed by Florida's first District court of appeals; see TIMMS V. STATE, 405 so 2d 1015 (Fla. 1st D.C. 1981).

Subsequent thereto, Respondent filed motion for post conviction relief under rule 3.850 of Florida rules of criminal procedure in case number 80-23 CF. Respondent raised three claims for relief therein; to wit:

1. APPELLANT WAS DENIED THE RIGHT TO A FAIR AND IMPARTIAL TRIAL AND DENIED DUE PROCESS WHEN THE STATE FAILED TO ESTABLISH A PROPER CHAIN OF CUSTODY;

2. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY "STATE ACTION" WHERE THE COURT HAD EXTRANEOUS COMMUNICATION WITH A WITNESS, AND COUNSEL MOVED FOR MISTRIAL.

3. Trial COURT ERRED IN REQUIRING APPELLANT TO PAY PURSUANT TO F. S. 960. 20, when APPELLANT WAS DECLARED INDIGENT.

During the pendency of the aforesaid motion, Respondent filed post conviction motion in case number 80 - 23 CF, in the trial court, under 3.850 of Florida rules of criminal procedure. The issue/grounds

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The petitioners assert that this case present an opportunity for the Court to clarify what it meant in Engle v. Isaac, 456 U.S. 107, 125 n. 28 (1982), when it explained that there was a difference between the procedural default doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977) and the exhaustion doctrine of 28 U. S. C. 2254 (b). However, it is here contended that:

the differentiation between the procedural default of Wainwright v. Sykes, and the exhaustion doctrine of 28 U. S. C. 2254 (b) as discussed in Engle, Supra, needs no clarification because the distintion is quite apparent*. What petitioners are in essence asking--under guise of clarification--is that this Honorable Court increase their swelling arsenal of procedural devises; in that equip them with another procedural rule/tool to thwart the convicted prisoner efforts to obtain meaningful review of his Federal Claims. A purpose for which neither Wainwright, Supra, nor 2254 (b) was intended, but has been so employed by petitioners in the case at bar, in that:

in the District Court as well as the Court below, petitioners represented that Respondent has undergone procedural default on his Federal Claims, and urged application of the procedural default doctrine of Wainwright Supra. The District Court relying upon the misleading arguement, and an incomplete record provided by petitioners, in conjunction with the state trial court's summary denials which was based upon a theory that the grounds presented could have been or should have been raised on direct appeal dismissed Respondent's Federal Claims in case number 83-1156-

---

* Wainwright v. Sykes, Supra, mandates that where a state procedural rule require a contemporaneous objection on a specific matter either before or during trial, if the litigant fails to comply therewith, he or she will not be heard to complain at a subsequent stage of the judicial process absent a showing of cause and prejudice. On the other hand:

28 U. S. C. 2254(b) mandates that a state prisoner exhaust all available state remedies before resorting to Federal Court for vindication of Federal Constitutional rights.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply in Opposition to Application for Writ of Certiorari has been forwarded to Lawrence A. Kadec, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 via U.S. Mail this 23 day of June 1985.

Edward James Thomas
EDWARD JAMES THOMAS, FOR COUNSEL

John Resnick
June 23, 1985

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires